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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 20th day of September, 2000

Application of

TIE AVIATION, INC.
d/b/a TRANS INTERNATIONAL EXPRESS

for a certificate of public convenience and necessity to
engage in foreign charter air transportation of property
and mail pursuant to 49 U.S.C. 41102

Served: September 20, 2000

Docket OST-00-7168 - 6

Application of

TIE AVIATION, INC.
d/b/a TRANS INTERNATIONAL EXPRESS

for an exemption pursuant to 49 U.S.C. 40109

Docket OST-00-7197 - 6

**ORDER TO SHOW CAUSE
PROPOSING DENIAL OF APPLICATIONS**

Summary

By this order, the Department tentatively finds that the applications filed by TIE Aviation, Inc. d/b/a Trans International Express (TIE) for a foreign charter all-cargo certificate under 49 U.S.C. 41102 (Docket OST-00-7168) and a *pendente lite* exemption pursuant to 49 U.S.C. 41109 (Docket OST-00-7197) should be denied because the applicant does not propose—at least initially—to conduct operations under this authority as a direct air carrier utilizing large aircraft and has failed to demonstrate its fitness to do so. Rather, TIE, which operates only small aircraft, intends to enter into contracts with foreign air carriers for the transportation of mail by those carriers utilizing large aircraft under TIE's airline designator code. Thus, in the conduct of these services, TIE would be acting more in the nature of an indirect air carrier.

Background

Section 41102 of Title 49 of the United States Code (Transportation) ("the Statute") directs us to determine whether applicants for certificate authority to provide foreign charter air transportation are "fit, willing, and able" to perform such transportation and

to comply with the Statute and the regulations of the Department. We must also find that the applicant is a U.S. citizen as defined in the Statute.

TIE, based in Jamaica, New York, was found fit and issued effective authority to engage in small aircraft operations as a commuter air carrier in March 1999.¹ At the time it was found fit, TIE proposed to operate scheduled passenger service six days per week between JFK International Airport and Hartford, Albany, Atlantic City, and Niagara Falls using two 36-seat Shorts SD3-60-300 aircraft. TIE currently operates these aircraft in once daily scheduled passenger service six days per week between Islip and Atlantic City, as well as in charter operations. The carrier is currently owned by Michael Melnicke (72 percent), Ruth Cohen-Lamdan (18 percent), and Issac Schwartz (10 percent). Mr. Schwartz serves as Chairman of the Board of Directors. Neither Mr. Melnicke nor Mrs. Cohen-Lamdan holds any position with TIE.

On June 2, 1999, TIE filed an application in Docket OST-99-5768 requesting a certificate to engage in foreign scheduled passenger air transportation. TIE proposed to operate one B-747 aircraft between New York and Tel Aviv. After review of TIE's application, the Department's staff sent the carrier a letter requesting additional fitness information and questioning (1) what steps TIE had taken to employ any new senior management individuals with large jet aircraft operating experience, (2) the reasonableness of its estimated pre-operating and operating expenses since TIE had indicated that most of its overhead expenses for its proposed B-747 aircraft operations had already been paid and were fully absorbed by its commuter operation, and (3) how the carrier intended to finance its proposed large aircraft operations. TIE did not respond to the letter; rather, it withdrew its application, which we dismissed by Order 99-9-12, issued September 21, 1999.

Also in September 1999, the FAA advised us that TIE had undergone several changes in its key management and technical staff that included a departure of its President, Director of Operations, and Chief Pilot. In addition, we received information that appeared to indicate that Jacob Lamdan, TIE's founder and former Chief Executive Officer and Board Member, was again in control of the carrier's daily operations, which brought into question TIE's citizenship and compliance disposition.² As a result, on September 28, 1999, the staff sent TIE a letter raising concerns about the carrier's continuing fitness and its qualifications to hold commuter authority. On October 28, 1999, TIE responded by stating that it had undergone a number of changes in its key

¹ See Orders 99-4-6, 99-3-7, and 99-2-17. TIE was formed in 1993 and operated as an on-demand air taxi operator prior to being found fit as a commuter.

² Our review of TIE's April 1, 1998, application for commuter authority revealed that Mr. Lamdan and his wife, Ruth Cohen-Lamdan, both Israeli citizens, held senior executive positions with the carrier and that Mrs. Cohen-Lamdan held 20 percent of TIE's voting stock, which gave them the ability to control TIE. Consequently, both Mr. and Mrs. Lamdan were required to resign their positions and to present affidavits stating that they would not participate in the company in senior management positions, but could participate in minor, non-management positions with the carrier. The Lamdans furnished their affidavits on August 14, 1998.

personnel that should serve to strengthen the carrier's organizational structure and operation; and that, while Mr. Lamdan has served as an advisor on several projects at the carrier, he reports to the President or board of directors and is not in a position to control the operations of the carrier.³

The Current Applications

On March 31, 2000, TIE filed an application in Docket OST-00-7168 requesting a certificate to engage in foreign charter air transportation of property and mail. Specifically, TIE proposes to enter into code share arrangements with foreign air carriers in order to bid on U.S. Postal Service contracts for the foreign transportation of mail. TIE does not plan to operate its own aircraft in this service.

On April 5, 2000, TIE requested an exemption in Docket OST 00-7197 to enable it "to place its designator code on flights operated by foreign air carriers for the foreign transportation of mail" pending the receipt of its requested certificate authority. In support of its request, TIE states that, in December 1997 it entered into a code share arrangement with El Al Israel Airlines for the sole purpose of transporting mail on behalf of the U.S. Postal Service. TIE states that by contracting with it—a U.S. air carrier—for this service, the Postal Service was able to save money over the cost of contracting directly with a foreign air carrier. TIE states that it initially received a letter from the Department stating that it had all of the necessary authority to operate under a code share for the transportation of mail. However, that position was subsequently reviewed, and on February 25, 2000, TIE was advised by the Department's Office of Aviation Enforcement and Proceedings that it did not have the necessary authority to conduct this service because 14 CFR 298.3(a)(1) prohibits an air taxi or commuter from holding out service with large aircraft, and because 14 CFR 212.11 requires prior approval of such code share arrangements, which TIE had not received. As a result, TIE terminated its code share mail service in February. It has now filed the certificate application and exemption request so that it may resume these code share mail operations.

Answers and Reply

Objections to the certificate and exemption applications were filed by Trans World Airlines, Inc. (TWA), United Air Lines, Inc., and American Airlines, Inc.

TWA alleges that, although TIE has requested a license to operate large aircraft, "the primary missing element to TIE's request is the large aircraft itself." TWA also states that, since TIE completely fails to propose an actual expansion in its operations to accommodate large aircraft, it is unclear how the Department can issue such a license. TWA argues that the instant applications cannot be viewed independently of the certificate application that TIE filed last year—but ultimately withdrew—in which TIE failed to specify how it intended to finance its proposed B-747 operations. TWA alleges

³ Mr. Lamdan provided a new affidavit to this effect.

that TIE is attempting to remedy this deficiency by eliminating the major source of its problem—the large aircraft. TWA also questions TIE’s willingness to comply with Department regulations, and notes that the Department sent a letter to Virgin Atlantic Airways in October 1999 regarding a proposed mail code-share agreement with TIE in which the Department explicitly stated that Virgin Atlantic could not enter into such a relationship without first obtaining a Statement of Authorization under 14 CFR 212. Despite this admonishment, TIE continued to place its code on other foreign airlines until February 2000.

United alleges that TIE is seeking foreign authority in order to “rent its code” to foreign air carriers “to secure mail contracts through the U.S. carrier preference built into the U.S.P.S. procurement process.” United alleges that, if TIE can be granted a certificate based on the circumstances proposed here, “then any foreign carrier would be free to establish a virtual airline in the U.S. for the sole purpose of obtaining mail contracts from the U.S.P.S. under circumstances inconsistent with applicable law.” Moreover, United questions whether the foreign charter authority that TIE seeks is sufficient for it to hold out its code for mail service on a foreign carrier’s scheduled operations; and whether TIE has sufficient financial resources and adequate compliance disposition to support a favorable fitness determination.⁴

American also alleges that the Department’s certification process should not be made available to small carriers who wish to sell their U.S.-flag designator codes to foreign airlines in order to secure contracts to transport mail in international markets.

TIE filed a consolidated reply to these answers. TIE argues that American, TWA and United have objected to its applications “because TIE’s proposal represents competition to them.” TIE states that it sees no difference between its proposal and the code share arrangements entered into by these larger carriers with foreign carriers to carry U.S. mail, except that the objectors currently operate large aircraft, while TIE plans to initiate such service when it is in a position to do so, possibly within the next year. TIE also argues that its proposal does not involve any potential to mislead consumers, since it would only be holding out its services to the U.S. Postal Service.

Tentative Findings

It is clear from TIE’s applications that the carrier has no immediate plans to operate large aircraft itself in any air transportation service nor has it met its burden of demonstrating its fitness to conduct such operations if it had presented such a plan. It has not been our policy to allow an air carrier to hold out air transportation service if that air carrier is not also capable of performing, and has not demonstrated its fitness to perform, such service on its own behalf. TIE does not intend to acquire or operate large aircraft itself, at least in the immediate future. Rather, the services it proposes

⁴ In this regard, United notes that TIE reported an operating loss in CY1999 of \$3.1 million on \$6.9 million in net revenues, and has an accumulated deficit of nearly \$4 million. It also questions TIE’s “unlawful mail activities”.

amount to no more than indirect air carriage as an air freight forwarder. As we have determined in previous cases,⁵ we do not find that it is in the public interest to permit TIE to hold out service as a direct air carrier that it is not capable of providing in its own right. To offer such service could violate the requirements of 49 U.S.C. 41712, which prohibits unfair methods of competition and unfair and deceptive trade practices on the part of air carriers and foreign air carriers.

We are also concerned under the circumstances present here, as we have been in other instances, about the public interest ramifications of carriers using our licensing processes to compete in a potentially unfair manner for Postal Service subsidies.⁶ Thus, we are also sensitive to the arguments made by the objecting air carriers that TIE merely wants to "rent its code to foreign air carriers" in order to give those foreign air carriers preferential treatment that is reserved for properly authorized U.S. air carriers. Moreover, even if TIE were to operate its own large aircraft, we agree with United that TIE would need to obtain scheduled rather than charter authority in order to conduct its proposed operations.

Hence, we tentatively find that TIE has failed to demonstrate a proposed operating plan that could be determined reasonable for a direct air carrier utilizing large aircraft, and has failed as well to demonstrate its fitness to conduct large aircraft operations. Therefore, we tentatively conclude that TIE may not be issued a certificate of public convenience and necessity authorizing it to engage in foreign charter all-cargo air transportation and may not be granted an exemption to place its designator code on foreign air carrier flights.

OBJECTIONS

We will give interested persons 14 days following the service date of this order to show cause why the tentative findings and conclusions set forth here should not be made final; answers to objections will be due within 7 days thereafter. We expect such persons to direct their objections, if any, to the application and points at issue and to support such objections with detailed economic analyses. If an oral evidentiary hearing or discovery procedures are requested, the objector should state in detail why such a hearing or discovery is considered necessary, and what material issues of decisional fact the objector would expect to establish through a hearing or discovery that cannot be established in written pleadings. The objector should consider whether discovery procedures alone would be sufficient to resolve material issues of decisional fact. If so, the type of procedure should be specified (*See* Part 302, Rules 25 and 26); if not, the reasons why not should be explained. We will not entertain general, vague, or unsupported objections. If no substantive objections are filed, we will issue an order that will make final our tentative findings and conclusions with respect to TIE's operating proposal and deny its application in Docket OST-00-7168 for foreign charter all-cargo authority and its application in Docket OST-00-7197 for a *pendente lite*

⁵ See, e.g., Wolf International Airlines, Inc., Orders 95-6-12, 95-9-13, and 96-4-9.

⁶ See, e.g., Orders 93-1-21 and 93-6-33.

exemption. If, however, TIE is able to provide a reasonable operating proposal that demonstrates its ability to conduct foreign charter all-cargo air transportation with large aircraft operations, we will reconsider our proposed action.

ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order finding that TIE Aviation, Inc. d/b/a Trans International Express has failed to demonstrate a reasonable operating proposal and denying it the requested section 41102 certificate authority and *pendente lite* exemption that it seeks.
2. We direct any interested persons having objections to the issuance of an order making final the proposed findings and conclusions stated above to file them with the Department of Transportation Dockets, 400 Seventh Street, SW, Room PL-401, Washington, D.C. 20590 in Docket OST OST-00-7168 and OST-00-7197, and serve them upon all persons listed in Attachment A no later than 14 days after the service date of this order; answers to objections shall be filed no later than 7 days thereafter.
3. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action.⁷
4. In the event that no objections are filed, we will consider all further procedural steps to be waived and we will enter an order making final our tentative findings and conclusions.⁸
5. We will serve a copy of this order on the person listed in Attachment A.
6. We will publish a summary of this order in the Federal Register.

By:

FRANCISCO J. SANCHEZ
Assistant Secretary for
Aviation and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
<http://dms.dot.gov>*

⁷ Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.

⁸ Denial of a foreign certificate is subject to Presidential review under 49 U.S.C. 41307.

**Service List for TIE Aviation, Inc.
d/b/a Trans Express International**

Mr. Donald C. Young
Chief Executive Officer
TIE Aviation, Inc.
P.O. Box 300994
JFK International Airport
Jamaica, NY 22430

Mr. Nicholas A. Sabatini
Manager FAA AEA-200
Eastern Region Headquarters
JFK International Airport
Fitzgerald Federal Building
Jamaica, NY 11430

Ms. Loretta E. Alkalay
Regional Counsel, FAA AEA-7
Eastern Region Headquarters
JFK International Airport
Fitzgerald Federal Building
Jamaica, NY 11430

Mr. Joseph McNeil
Manager, FSDO 15
Federal Aviation Administration
990 Stewart Avenue, Suite 630
Garden City, NY 11530

Mr. Richard Dutton
Assistant Manager, CSET
Federal Aviation Administration
AFS-900 Suite 203B
45005 Aviation Drive
Dulles, VA 20166-7537

Mr. Donald Bright, Acting Director
Office of Airline Information, K-25
Department of Transportation
400 Seventh Street S.W.
Washington, D.C. 20590

Mr. Allan Muten
Assistant Treasurer Ste. 800
Airline Reporting Corp.
1530 Wilson Boulevard
Arlington, VA 22209

Mr. David M. Kirstein
Baker & Hostetler, LLP
Counsel for TIE Aviation
One Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, DC 20036

Mr. Carl B. Nelson, Jr.
Associate General Counsel
American Airlines, Inc.
1101 17th Street, NW, Suite 600
Washington, DC 20036

Mr. Bruce H. Rabinovitz
Ms. Cathleen P. Peterson
Counsel for United Air Lines
Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, DC 20037

Mr. Glenn P. Wicks
The Wicks Group
Counsel for Trans World Airlines
1700 N. Moore Street
Suite 1650
Arlington, VA 22209

Mr. Peter Lynch AGC-300
Asst. Chief Counsel for
Enforcement
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20590

Mr. Jim Nawrot
Transportation Specialist
U.S. Postal Service
475 L'Enfant Plaza, SW
Room 7826
Washington, DC 20260

American Association of Airport Executives
4224 King Street
Alexandria, VA 22302

Mr. J.D. Meador
Airline Data Coordinator
Innovata, LLC
3915 Old Mundy Mill Road
Oakwood, GA 30566-3410

Ms. Joni Mount
Official Airline Guides
2000 Clearwater Drive
Oak Brook, IL 60521

Mr. Jim Zammar
Director of Revenue Accounting
Air Transport Association
Suite 1100
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004